No. 18,226.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MORTON K. LANGE,
Appellant, Cross-Appellee,

vs.

LIBERTY NATIONAL INSURANCE COMPANY,
Appellee, Cross-Appellant.

Appeal from the United States District Court for the District of Idaho, Northern Division.

APPELLANT'S REPLY BRIEF.
CROSS-APPELLEE'S BRIEF ON CROSS-APPEAL.

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INDEX TO APPELLANT'S REPLY BRIEF.

Cases Cited.

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Textbooks Cited.

INDEX TO CROSS-APPELLEE'S BRIEF ON CROSS-APPEAL.

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APPELLANT'S REPLY BRIEF.

I.

The December 10, 1956, resolution contemplated the complete refinancing of the company, and restoring it to a condition of solvency, and successful operation, with a multiple line license, and it was so explained to plaintiff (Tr. p. 44).

Plaintiff subscribed to the stock under a **written** agreement which provided that the money would be held by the Trustee until sufficient funds had been subscribed to accomplish that result. The **subscription** alone did not authorize the taking of the money into the Treasury, unless it was sufficient to provide the minimum capital **and** to permit the continued operation.*** Nor did it relieve the Commissioner of his responsibility to be able to guarantee this before he accepted it.

*** Where possible, a reasonable and equitable interpretation will be given a contract, and not one which will give one party an unfair advantage. An absurd result will be avoided. 17 C. J. S. 739. Plaintiff's correspondence shows that this was not his understanding. See Exh. 21, Exh. 23 and Exh. 27.

By accepting the money into the Treasury, the Rehabilitator impliedly represented and "guaranteed" that it was sufficient for both purposes above mentioned.* Mr. Albertson's failure to file the evidence necessary for the joint control order, plus his correspondence,** plus his testimony at the trial show that it was sufficient for neither. His testimony, and defendant's brief (p. 20), admit that he would not have been able to "absolutely promise" that the assets and liabilities were in balance at year end until a "couple of months" later, and until the claims had run off (Tr. p. 330). A "couple of months" later, when he could tell, the policy holders surplus had decreased over $100,000. This, however, the defendant concealed from the plaintiff for over a year and one-half.***

There is no present contention, and there was no testimony that plaintiff was a party to any agreement or any discussion which modified the agreement **after it was signed,**† or that the minds of the parties met on a definite modification.†† There is no contention and there was no testimony that there was a modification of the agreement to permit the acceptance of the money unless all

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* To promise is to "guarantee". Manuel v. Calestagas Vinyard Co., 61 Pac. (2) 1204; Wright v. Barnard, 248 Fed. 256; McClune v. Central Trust Co., 165 N. Y. 10, 58 N. E. 777, 26 C. J. S. 1069. He expressly represented that it was sufficient to permit the company to operate **"during the year 1957"** by sending plaintiff a copy of Exh. 18.

** Exhibits 19, 21, 22, 53, 55, 56, 59.

*** Where one who has made a misstatement remains silent after he has learned of his error, he is both morally and legally in the same position as if he had known when his statement was made that it was erroneous. Chelson v. Houston, 84 N. W. 354, 9 N. D. 498; Maxwell Ice Co. v. Brockett, 116 Atl. 34, 80 N. H. 236; Hush v. Reaugh, 23 Fed. Supp. 646.

† Although the agreement is dated December 11, 1956, it was stipulated that it was signed on January 11, 1957 (P. T. O., p. 19).

†† Kell v. Gross, 171 Fed. (2) 715. A modification must be shown by clear and convincing evidence. Utley v. Donaldson, 94 U. S. 29, 24 L. Ed. 54, and will not be inferred from conduct of doubtful significance. Motor Parts Co. v. Bendix Home Appliances, 36 Fed. Sup. 649 (Cal.). The burden of proof to establish a modification is on the party asserting it. The Jobshaven, 270 Fed. 60.

of the above mentioned conditions were met. Nor is there any present contention that there was a modification of either of the conditions subsequent to return the money to the subscribers if sufficient funds were not raised by March 15 to permit continued operations, or to return the balance of the shares unsold to the treasury for cancellation upon acceptance of the money subscribed or of the agreement for joint control.

Although each one of the conditions above mentioned was a material part of the stock subscription agreement, not a single one of them was complied with. Therefore, even if the agreement was modified, it was not modified in any manner which would have affected the matters plaintiff now complains of. Whatever this alleged modification consisted of—and we confess that we cannot tell from defendants evidence what this was—it was wholly immaterial to this lawsuit.

Defendant says that the modification was necessary to provide the minimum capital for the defendant to continue in business after December 31, 1956, in order to avoid liquidation. The answer to that is that the funds subscribed did not provide the minimum unimpaired capital, in any event, except on paper.

Furthermore, the evidence does not sustain defendant's contention that this was the real reason for taking the money at that time. It was not required under Idaho law in order to avoid liquidation.*

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* Sect. 41-3504 of the Idaho Code contemplates Rehabilitation even during insolvency. The commissioner has broad discretion whether to liquidate or rehabilitate. Matter of National Surety Co., 239 App. Div. 490, 268 N. Y. S. 88; Matter of Globe and Rutgers Fire Ins. Co., 149 Misc. 18, 266 N. Y. S. 603. On this point plaintiff testified as follows (Tr. p. 194):

> Q. "You knew that the money had to go into the treasury very shortly after Dec. 31st or liquidation would follow"?
>
> A. "No, I didn't know that. The thing changed from time to time a little bit. He first said it would have to be by January 31. Later he changed it and said that the deadline could be extended to March 15 to be reflected back to the Dec. 31 financial statement".

The real requirement to avoid liquidation was the urgent need to obtain money to pay claims. The evidence however falls short of showing that plaintiff was advised of this urgency. He denied that he was.***

Defendants real contention is that since plaintiff was anxious to avoid liquidation, and since it was necessary to use the money to pay claims to avoid liquidation, plaintiff impliedly agreed to the use of the money for that purpose, regardless of all of the other conditions of the agreement. This argument confuses plaintiffs motive with the actual consideration for the stock subscription.*

Concededly, plaintiff wanted to avoid defendant's liquidation. He knew the financing was minimal and that further financing was needed to permit "successful operations". However this was a conditional **subscription,** not a direct sale, and the payment was made to a trustee to be held until the conditions were complied with. It does not follow that plaintiff would have agreed to subscribe to this stock under a plan that was less than minimal, which would have permitted the acceptance of the money to pay claims, and merely postpone the liquidation for two months.

Defendant admits that even under its modification theory the funds subscribed were to have been returned to the subscribers if sufficient subscriptions were not obtained by March 15 to permit the continued operation of the

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*** Mr. Dolan and Mr. Albertson testified that there was a cash shortage to pay claims. Neither testified that he or any one else advised plaintiff thereof. Mr. Dolan testified that it was common knowledge, and that "he was sure" plaintiff was aware of it. See Union Pacific Ry. Co. v. O'Brien, 16 Sup. Ct. 618, 161 U. S. 451, a witness cannot say what other witnesses are aware of. This is mere opinion, and cannot be considered substantial evidence even when uncontradicted. Otis v. S. E. C., 176 Fed. (2) 34, Wichita Falls Ry. Co. v. Holbrook, 50 S. W. (2) 428. Mr. Albertson's first direct mention to plaintiff of a shortage of cash (Ex. 53) advised that this is to be expected, not this was to be expected. This implies that plaintiff was not informed of it before hand.

* Williston, Contracts, Sect. 111; Williston, Contracts, Sects. 860, 1292; Klein v. Zeeve, 92 Pac. (2) 877, 1 C. J. S. 1318.

company. The money therefore should have been held in trust until March 15, and returned immediately thereafter, when it appeared that sufficient subscriptions had not been obtained.† The spending of this money as well as the accepting of it was, therefore, a conversion.*

The Court's findings that the money was turned over to the defendant "absolutely", ignored the fact that, if so, plaintiff, under the agreement, thereby and thereupon became a stockholder in the defendant,** also that under the agreement, the balance of the shares of stock were in the hands of the Commissioner for one purpose only, namely to be returned to the Treasury for cancellation, and the sale thereof to the Becker-Rummel group was a direct violation thereof, and absolutely void.***

This very flagrant violation of the escrow agreement was established by undisputed, **stipulated** evidence (P. T. O. p. 5).**** It was completely ignored by the trial Court in his findings, and is dismissed by the defendant's brief (p. 23) in this Court with a flippant remark.

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† Hulen v. Stuart, 191 Cal. 562, 217 Pac. 750; Wann v. Diablo Finance Corp., 23 Pac. (2) 303, 132 C. A. 621.

* Grocers, Inc. v. Horstmann, 46 N. W. (2) 254, 233 Minn. 192; Firsthamel v. Campbell, 55 Cal. App. 774, 205 Pac. 25; National Bank of the Republic v. Price, 234 Pac. 231; Cobbin v. Conklin, 208 Fed. 231; Robertson v. 1st National Bank, 35 Ida. 363, 206 Pac. 689; Barnett v. Williams, 168 So. 583; Porter v. Beha, 8 Fed. (2) 65, affmd. 12 Fed. (2) 513; Lucas v. Central Missouri Trust Co., 166 S. W. (2) 1053, 350 Mo. 593; Petroleum Royalties Co. v. Hartford Accident and Indemnity Co., 106 Fed. (2) 440, 124 A. L. R. 1403. Mason v. Lievre, 145 Cal. 582, 78 Pac. 1040; Majors v. Girdner, 159 Pac. 826.

** As of that moment, title passed, and plaintiff became the owner of 6,452 shares out of 21,522 outstanding shares, or of an approximate ⅓ interest, Mitchell v. Beekmen, 28 Pac. 110, 64 Cal. 117; Young v. Pedrara Onyx Co., 192 Pac. 55.

*** Williston on Sales, Section 311. It is a fundamental doctrine of the law of sales that no one can give what he has not. If the money was accepted absolutely, the old stockholders' share in the company was fixed at 2,162 shares, or a 10% interest in the whole. They no longer owned 38,377 shares to which they could transfer title. Young v. Pedrara Onyx Co., supra; Hulen v. Stuart, supra; Wann v. Diablo Finance Corp., supra.

**** Lumbermens Trust Co. v. Town of Rygate, 61 Fed. (2) 14 (C. C. A. 9); Home Indemnity Co. v. Standard Accident Ins. Co., 167 Fed. (2) 919.

As the owner of an approximate one third interest in the defendant company, plaintiff acquired certain rights to a proportionate voice in determining to **whom** such shares should be sold, and a proportionate voice in the selection of Directors, who would carry out the policies which he favored,* and a proportionate voice in whatever further refinancing the Commissioner required.

The defendant treated the entire proceeding under the December 10, 1956, resolution as void, because the plan was not completed by March 15, 1957. Having so treated it, the defendant cannot now treat it as having been effective as to plaintiff, but void as to itself.**

None of the defendant's so-called defenses are applicable to this cause of action.

Plaintiff's specific refusal to sign a waiver and consent to the sale of this stock until the defendant would get behind the Agency and carry out its commitments, was an affirmative indication of an intention **not** to waive his rights to rescission. It was equivalent to a reservation of rights.†

II.

(1) Plaintiff does not predicate a charge of fraud upon the broken promise alone to provide Green Cards, excess limits, and expanded coverage. He predicates a charge of breach of a collateral agreement which was a substantial part of the consideration for the stock subscription agreement, which breach justified rescission.†† The charge

* In Re National Lock Company, 9 Fed. Supp. 432; Campbell v. Coin Machine Mfg. Co., 188 Pac. 197, 96 Oregon 119; McArthur v. Port of Havana, 247 Fed. 984.

** When a person accepts the benefits of a new contract, he cannot maintain that the old contract was in effect. 31 C. J. S. 351; Richardson v. Heslap, 293 Pac. 168, 109 Cal. App. 440; Menton v. Mitchell, 265 Pac. 271; Penn Mutual Life Insurance Co. v. Bank of America Trust and Savings Association, 54 Pac. (2) 453, 5 Cal. (2) 288.

† Woods v. Markwell, 258 Pac. (2) 503.

†† Carlton v. St. Vincent Seed Co., 129 Cal. App. 222, 18 Pac. (2) 407; Meeks v. Commonwealth Bonding Co., 187 S. W. 681.

of fraud is predicated on the making of the promises with intention not to perform. The evidence in support of this charge consisted not only of the promises, and the failure to perform, but also the inconsequential time lapse between the making of the promise and the refusal to perform; the lack of the pretense at performance, and subsequent conduct and speech showing no intention to perform while, leading plaintiff to believe performaance was forthcoming.**

Defendant's argument that the Agency had Green Cards most of the time, overlooks the fact that the arrangements for Green Cards with the Fortune Insurance Company were bogus arrangements, were recognized by the defendant as such,*** and that it made repeated promises before, during and after the Rehabilitation to obtain legitimate ones.

The argument that the obtaining of Green Cards was beyond the defendant's control admits that defendant was unable to get them. Impossibility of performance is not a defense to an action for rescission grounded upon breach of contract.*

(2) Plaintiff was entitled to rely upon Mr. Albertson and Mr. Chapman.† Plaintiff testified that he did rely upon representations made by Mr. Albertson and Mr. Chapman.†† There was no evidence that he did not. Aside

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** Pocatello Security Trust Co. v. Henry, 35 Idaho 821, 206 Pac. 175, 29 A. L. R. 347; McLean v. Southwestern Casualty Ins. Co., 61 Oklahoma 79, 159 Pac. 660.

*** The use of these bogus Green Cards by the defendant was a violation of the principal's duty to protect the agents' reputation. Restatement, Agency, 437.

* Fish v. Valley Bank of Phoenix, 167 Pac. (2) 107; Bridges v. Ingram, 223 Pac. (2) 1051.

† In Detroit Fire and Marine Insurance Co. v. Sargent, 42 Idaho 369, 246 Pac. 311; Watson v. Holden, 79 Pac. 503, 10 Ida.

†† Plaintiff testified (Tr. pp. 165, 166) that he had no knowledge of the company except for what he was told; that he was told and understood that Mr. Albertson had made an audit of the company; that Mr. Albertson had the "know-how" that he, plaintiff, did not have, and he relied on Mr. Albertson and Mr. Chapman's statements.

from his own evidence he was entitled under the facts of this case to a presumption that it was intended that he should rely on them*** and that he did rely upon them.*****

The other factors or motives may have influenced plaintiff's subscription or that the misrepresentations were not the sole or predominating force, is immaterial.**** Defendant completely ignores that its false 1954 financial statement was the original inspiration for plaintiff's motive to save the company from liquidation.

(3) The representations admittedly (Tr. p. 327) made to plaintiff were all statements of fact, not opinion, within the meaning of the law of fraud.*

These statements are actionable even though Mr. Chapman and Mr. Albertson believed them to be true at the time they were made. It is sufficient that they made them without knowing them to be true.** Mr. Chapman, as Vice

*** Defendant's intention to induce plaintiff to action and to alter his position can be inferred from the fact that representations were made with knowledge that plaintiff could act upon reliance of them. Gagner v. Bertram, 275 Pac. (2) 15, 48 C. (2) 481; Nathanson v. Murphy, 282 Pac. (2) 174, 132 Cal. App. (2) 363.

***** Where representations have been made in regard to a material matter, and action has been taken, it will be presumed that the representations were relied upon, in the absence of evidence showing the contrary. Williston, Contracts, Section 1516.

**** McDonald v. DeFremery, supra; Sheffer v. Rednech, 196 N. E. 864, 291 Mass. 205; Light v. Jacobs, 183 Mass. 206, 66 N. E. 799; Williston, Contracts, 3rd Edition, Section 1515; Buck v. Leech, 69 Maine 484; McGrath v. Ct. Scherer Co., 195 N. E. 919, 37 C. J. S. 539; 37 C. J. S. 26.

* Representations that a company is solvent, or with reference to the condition of its business, or as to its previous earnings, that it is not indebted at all, or is only indebted to a certain extent, may constitute actionable fraud, even though the person making them believed them to be true. 12 Fletcher, Corporation, 5583. Examples of similar representations may be found in Leary v. Baker, 258 Pac. (2) 1090 (1953); Burckhardt v. Woods, 12 Pac. (2) 482; Goodin v. Palace Store Co., 4 Pac. (2) 493; Guaranty Mortgage Co. v. Ellison, 239 Pac. 29, Utah (1925); Nevada Bank v. San Francisco and Portland National Bank, 59 Fed. 338. The representation that Mr. Albertson had made an audit of the company (Tr. p. 276) was itself a representation. Guaranty Mortgage Co. v. Ellison, 239 Pac. 29 (Utah 1925).

** Wietzel v. Jukich, 73 Idaho 301, 251 Pac. (2) 542; Turner v. Pemberton, 221 Pac. 133, 38 Idaho 235.

President, and Mr. Albertson, who advised plaintiff that he had made an audit (Tr. pp. 165, 166, Ex. 10), had means of information not open to plaintiff, and the parties were not dealing on equal terms. Under these circumstances, even a matter of opinion may amount to an affirmation of fact and should have been construed as a representation that they knew facts which justified the opinion.*** The evidence clearly showed that the representations were false; that as to Mr. Chapman they were known to be false,* and as to Mr. Albertson that they were at least made recklessly without knowledge of their truth, and were, therefore, not honestly believed.**

Although concededly, Mr. Albertson had nothing to do with the actual sale of this stock, and did not profit thereby, his own evidence (Tr. p. 327) shows that he made the representations which were calculated to and did induce action on the part of the plaintiff (Tr. p. 165); and that he obtained his information from the defendant's officers and employees (Tr. p. 343).† The rule that a corporation is liable for the fraud of a receiver†† should certainly apply in this case where the fraud was due to false infor-

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*** Downs v. National Share Corp., 55 Pac. (2) 27 (Ore.); Fletcher, Corporation, 5591; Hindman v. First National Bank of Louisville, 112 Fed. 931; Bigelow, Fraud (1890), p. 509. Restatement of the Law of Contracts, Sect. 471: A tells B he has investigated the affairs of company C, and that it is sound financially. He has not investigated C company. His statement is fraudulent even though he believed C company is sound financially.

* Griswold v. Gebbe, 126 Pa. 353, 17 Atl. 673; O. F. Nelson Co. v. United States, 149 Fed. (2) 692 (9th Circuit) (19..); Masterson v. Pig'n Whistle Corp., 326 Pac. (2) 919. Plaintiff is entitled to an inference from the failure to call Mr. Chapman as a witness. Morrow v. Franklin, 233 S. W. 231 (1931); Powell v. Landes, 36 Pac. (2) 462, 95 Colo. 375.

** Hobart v. Hobart Estate Co., 159 Pac. (2) 958, 26 Cal. (2) 412 (1945); McDonald v. DeFremery, 168 Cal. 199, 142 Pac. 73. An expression of opinion to avoid an action for deceit must be an expression of an opinion honestly entertained by the person making it.

† It is immaterial in an action for fraud that the person making the misrepresentations did not intend to benefit himself but solely to benefit a 3rd person. 37 C. J. S. 26. Representations made to a 3rd person to be communicated to plaintiff may be relied upon. 37 C. J. S. 284.

†† Hershberger v. Woodrow Parker Co., 275 Fed. 908.

mation furnished to the receiver. This is true whether the receiver intended to deceive the plaintiff or not. Obviously, the defendant so intended by furnishing the receiver with false information. Schafuss v. Betts, 94 Misc. 463, 157 N. Y. S. 608.

The company ratified Mr. Chapman's misrepresentations, and also his promises to obtain Green Cards and other facilities, by accepting the benefits of the subscription. This is so clear that defendant's brief does not even try to answer it.***** It is also clear that all of the stockholders, who were officers and Directors, specifically ratified both Mr. Chapman's and Mr. Albertson's actions at the meeting of April 15, 1957. The District Court approved Mr. Albertson's approval of the agency contract, when it approved his acts at the termination of the Rehabilitation (Ex. 65).**

(4) Defendant refers to no evidence which indicates that plaintiff did not believe or rely on the representations in question. The defendant repeated the representations to plaintiff and concealed the true facts from him for a year and half. This shows that the plaintiff did believe the representations, that defendant knew he believed them, and wanted him to continue to believe them, until enough time had elapsed for defendant to be able to cry waiver, estoppel, laches and ratification, just as it is doing now.

This argument also overlooks the obvious effectiveness of the Chapman, Albertson, Dolan combination in selling

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***** H. I. Case Co. v. Bird, 11 Pac. (2) 966, 51 Idaho 725; Inter Mountain Ass. of Cattlemen v. Pierce, 43 Idaho 279; Davenport v. Burke, 30 Idaho 599, 167 Pac. 481; Shake v. Fayette Valley Produce Exchange, 42 Idaho 403, 245 Pac. 683; United States v. Carbon County Land Co., 46 Fed. (2) 980.

** Standard Roller Bearing Co. v. Hess Bright Mfg. Co., 275 Fed. 916, C. C. A. 3, 1921; Reinsurance Agency, Inc. v. Liberty National Insurance Co., 307 Fed. (2) 164.

this stock. Obviously, somebody very, very well versed in the art of juggling figures at some time must have convinced Mr. Albertson of the soundness of this company,—and thereby armed it with a very potent weapon.*

III.

Defendant's claim that the plaintiff's claim is barred by res adjudicata is without merit.

There is a vast distinction between this case and the Reinsurance Agency case.*** In that case, this Court specifically ruled that the contract in question was one of the assets of the company taken over by the Rehabilitator, pursuant to the Rehabilitation order. The District Court acquired summary jurisdiction of the Reinsurance Agency by virtue of its jurisdiction over the res.†

In this case, the Court did not, by the appointment of the Rehabilitator, acquire jurisdiction of the stock of the company. The stock does not belong to the company, and is not therefore a part of the "res".** The Rehabilitator obtained custody of the stock, but not title thereto,†† and the sale of the stock under both plans was the act of

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* Mr. R. W. Nelson, President, Mr. R. S. Nelson, Secretary, Mr. A. L. Gridley, Mr. Ezra Whitla and Mr. W. C. McNaughton, Directors, all subscribed to stock under the minimum financing plan. Significantly absent from those who availed themselves of this golden opportunity were the two Vice Presidents, Vice President in charge of claims, Mr. Phili Dolan—now President—and Mr. Joseph Chapman. Mr. Chapman did risk about $200 to buy 25 shares of stock—Mr. Dolan not a penny. Exs. 65, 66.

*** Reinsurance Agency, Inc. v. Liberty National Insurance Company, 307 Fed. (2) 164.

† The distinction is clearly shown in Maloney v. Rhode Island Insurance Co., 251 Pac. (2) 1027, 115 C. A. (2) 238 (1953). See also People ex rel. Conway v. Metropolis Insurance Co., 239 N. Y. S. 55, which involved facts almost identical with those in this case.

** Fletcher, Corporations, Ch. 58. Section 5083, p. 41; Clark, Receivers, Sect. 707 a and c, 19 C. J. S. 1209.

†† "Custody" is the charge to keep and care for the property of the owner, subject to his order and directive, without any interest or right therein adverse to him. 25 C. J. S., p. 70.

the stockholders, not of the Rehabilitator.**** His participation in both plans was limited to his approval or disapproval, and even that was not necessarily required.***** This was not a statutory "Rehabilitation Plan", which required the stockholders and the creditors to scale down their interests, and which required court approval to make it binding on the non-assentors. It was purely a voluntary recapitalization plan, accomplished by the adjustment of securities, with the unanimous consent of all of the stockholder members, under which the Insurance Department agreed that the causes and conditions which had made the Rehabilitation necessary, had been removed.**

The proceeds of the sale of stock were subject to all of the rights and conditions attached to the stock subscription agreement, and could become assets of the company only when these conditions had been complied with.*** The Rehabilitator, of course, had no right to take property belonging to a third person, or to a better title than the company had.† The funds in question, therefore, remained trust funds in the hands of the company.*

**** Mr. Albertson was especially careful in his testimony to make this clear (Tr. p. 325 and p. 335). All of the sales contracts and subscription agreements make it very clear (Exhs. 24 and 26).

***** If a plan of reorganization merely contemplates the introduction of new capital, reorganization could proceed even though the commissioner's approval was lacking, unless it was otherwise required. In Re Lawyers Mortgage Co., 169 Misc. 802, 9 N. Y. S. (2) 250, Affmd., 256 App. Div. 974, 11 N. Y. S. (2) 250. If other grounds exist, application for termination will be denied. Matter of Globe and Rutgers Fire Ins. Co., 266 N. Y. S. 603. See also In Re Lawyers Title Co., 165 Misc. 776, 1 N. Y. S. (2) 137.

** Fletcher, Corporations, Sect. 7215; Northern Pacific Ry. Co. v. Boyd, 228 U. S. 482, 57 L. Ed. 931, 33 S. C. 554; Tolman v. Ubero Plantation Co., 142 Fed. 271.

*** Williston, Sales, Sect. 311; Fletcher, Corporations, Sects. 5613, 5479. Hulen v. Stuart, supra; Wann v. Diablo Finance Corp., 23 Pac. (2) 303, 132 C. A. 621.

† Arizona Corp. Commission v. California Ins. Co., 236 Pac. 460, 28 Ariz. 128; Porter v. Beha, 8 Fed. (2) 65, affmd. 12 Fed. (2) 552.

* Maloney v. Rhode Island Insurance Comp., 251 Pac. (2) 1027, 115 C. A. (2) 238 (1953); In Re International Milling Co., 259 N. Y. 77, 181

We are dealing here, not with a stockholder member of the company at the time the reorganization is necessary, who refuses to accept a plan of reorganization and tries to invalidate it, but with an investor non-member of the company, who offers to invest in a reorganization plan subject to certain conditions, but whose investment was accepted on other conditions.** This action is not an action to set aside the reorganization plan itself, but to rescind because of the breach of material conditions upon which plaintiff agreed to participate in it.***

Significantly, it does not appear that Mr. Albertson ever asserted any unconditional claim to the proceeds of the sale of stock under the minimum financing plan. He did not ask the District Court to rule on this question, and the Court did not rule on it.

It can hardly be denied that the plan under the December 10, 1956 resolution was abandoned in toto, shortly after plaintiff left, and the Becker-Rummel plan was subsequently adopted as the actual Rehabilitation plan. Both Mr. Moore and Mr. Dolan so testified (Tr. p. 180 and p. 366), and all of the minutes, documents, and actions of the parties so indicate. The Becker-Rummel group, with full knowledge that they needed plaintiff's consent, agreed to go ahead with the sale with or without it, and subject to his claim for the return of his money.****

N. E. 54; Farrell v. Stoddard, 1 Fed. (2) 802; In Re Lawyers Title and Guarantee Co., 162 Misc. 188, 294 N. Y. S. 381; People v. Metropolis Insurance Co., supra.

** Plaintiff agreed to subscribe on a basis whereby he would receive not less than approximate 1/6 interest. His interest was finally fixed at less than 11%.

*** Farish v. Cienguita Copper Co., 100 Pac. 781, 12 Ariz. 235, where a similar right of action is recognized. This distinguishes this case from Carpenter v. Pacific Mutual Life Insurance Co., 74 Pac. (2) 761.

**** See all of the documents comprising Exhibit 26, including the Opinion of the attorney-general.

With these facts very obviously in mind, and with full knowledge that plaintiff had raised the question of the legality of the stock sale, and while negotiations were in progress (Exhs. 33, 34) the Rehabilitator and the company agreed to permit the lifting of the Rehabilitation order. They thereby, by implication, agreed and represented to the Court that the reserves for outstanding liabilities, which necessarily included plaintiff's claim, were adequate.* By accepting the restoration of its property and the termination of the Rehabilitation proceedings, the company assumed responsibility for plaintiff's claim.** There is nothing in the proceedings for the termination of the Rehabilitation, including the judgment, to indicate that the proceedings were intended to go beyond the issue of the right of the Insurance Department to remain in control of defendants business.*** All of the evidence points to the contrary, including the notice of the hearing itself, which specifically informed plaintiff that "this is not a notice requiring you to appear, but you may do so if you desire" (Exh. 64).****

It appears that the District Court was informed of both Rehabilitation plans***** and was also informed of **facts,**

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* Matter of Globe and Rutgers Fire Ins. Co., supra.

** Texas and Pacific Ry. Co. v. Johnson, 151 U. S. 87, 14 S. C. 250; Clark, Law of Receivers, Sect. 697; Chicago, R. I. & Pac. Ry. Co. v. McBride, 136 Ark. 193, 206 S. W. 149.

*** Caminetti v. Imperial Mutual Life Insurance Co., 129 Pac. (2) 432, 139 Pac. (2) 681 (Same case).

**** Due process requires that a notice inform the opposite party of the nature of the claim. Philadelphia Co. v. S. E. C., 175 Fed. (2) 808.

***** State v. Bank Savings and Life Ins. Co., 75 Pac. (2) 297, 147 Kans. 170. Presumably the court did not approve two plans at the same time, one inconsistent with the other. Jones, Evidence, Sect. 47, 31 C.J.S. 769. Mr. Albertson's affidavit to the Court (Exh. 65) is replete with details concerning immaterial matters, but unusually vague concerning matters of importance. It fails to describe the minimum financing plan, except that it was minimal in nature. He also failed to describe the nature of the "arrangement" which he felt could be made to purchase the remaining outstanding shares. The only legal arrangement could have been to obtain the consent of the other subscribers, unless their subscriptions were void.

which clearly disclosed that the second plan was inconsistent with the first. He was not, however, informed of any facts indicating that the inconsistency had been resolved.† Indirectly, the Court was informed that it had not been resolved.††

The amount subscribed was between $375,000 and $400,000.00 without plaintiff's subscription, so that his subscription or the lack of it was immaterial to the right of the Insurance Commissioner to run defendant's business.* The judgment of termination was a judgment in rem as to the status of the defendant, and nothing more. It was not intended to and did not adjudicate the right of plaintiff to either accept or reject the Becker-Rummel plan, and obtain the return of his money. It is not res adjudicata as to the facts or as to the subsidiary questions of law.**

To adopt the defendant's construction of the Court's approval of the acts of the Insurance Commissioner and his deputy, is to convict him and his deputy—of participating in what would amount to a fraudulent and

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† The Court was informed (Exh. 65, p. 4) that under the December 10, 1956, resolution, the outstanding shares of stock should not be in excess of 40,000 shares with a par value of $200,000; and that 19,461 shares had been sold under that plan. It was also informed that under the Becker-Rummel proposal, the sale of the additional 38,377 shares was contemplated. The Court was not informed that plaintiff's consent had or had not been obtained.

†† Mr. Albertson specifically avoided telling the Court that the result of the refinancing would provide a policy holders surplus in excess of $400,000, which it should have done if the results of both refinancing plans had been considered. He qualified the statement by stating that "if the results of the refinancing were reflected back into December 31, 1956 financial statement," it would show that amount.

He also specifically avoided stating that the company had a paid in capital of $300,000. He said that if the Court approves the sale to the Becker-Rummel group, "all of the shares of stock will be in the hands of persons other than the Commissioner of Insurance, and the capitalization will again be reflected in the books at $300,000.

* Caminetti v. Imperial Mutual Life Insurance Co., supra.

** Freeman on Judgments, 1925 Edition, Sect. 689; Gratiot County State Bank v. Johnson, 249 U. S. 246, 39 S. C. 263, 63 L. Ed. 587; Manson v. Williams, 213 U. S. 453, 53 L. Ed. 869; Pickering Lumber Co. v. Whiteside, 128 Pac. (2) 899, 54 C. A. (2) 200; Woods v. Deck, 112 Fed. (2) 740 (C. C. A. 9); In re Courtney Bros., 100 Pac. (2) 471.

collusive* conspiracy to deliberately defeat plaintiff's known rights. The presumption of regularity of judicial proceedings forbids the adoption of this construction.**

The Court did not, of course, approve the illegal acceptance of the money into the Treasury in violation of the escrow agreement, because it was not informed of the facts showing that it had been violated. It could not create title, it could only confirm it. As to this money the Rehabilitator was a mere trespasser.***

If the construction adopted by the defendant were to be adopted, the judgment would be subject to collateral attack for several reasons. One is that it is a judgment obtained by extrinsic fraud and is subject to collateral attack.†

Another reason is that the Court had no jurisdiction over the subject matter,†† or over the person of the plaintiff. Plaintiff was not served with valid process, constructive service was not due process of law in this case, and in any event, the notice to plaintiff was insufficient for due process.††† The judgment is therefore void.****

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* With both the defendant and the Insurance Department being represented at the hearing by the same attorney, Mr. Philip Dolan—now President of the defendant—an inference of collusion would be virtually conclusive.

** Jones, Evidence, Sect. 47. Where a situation is explainable on the basis of legality, it will be assumed that such is the explanation. 17 C. J. S. 738.

*** Pickering Lumber Co. v. Whiteside, supra; Manson v. Williams, 213 U. S. 43, 53 L. Ed. 869, 29 S. C. 519; Porter v. Beha, supra; Clark, Receivers, Sect. 392, p. 654.

† Davi v. Belfior, 314 Pac. (2) 596, 153 C. A. (2) 325; Hazel Atlas Glass Co. v. Hartford Empire Co., 64 Sup. Ct. 997, 322 U. S. 238, 88 L. Ed. 1250; Griffith v. Bank of New York, 147 Fed. (2) 899; Freeman on Judgments, Sections 1234, 1237.

†† In Re International Milling Co., supra.

††† Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; Coe v. Armour Fertilizer Works, 237 U. S. 413, 59 L. Ed. 1027.

**** Freeman on Judgments, 1925 Edition, Sect. 322; Hansberry v. Lee, 311 U. S. 32, 61 S. C. 115, 85 L. Ed. 22; Philadelphia Co. v. S. E. C., supra.

If the Idaho Statute is construed to permit the taking of plaintiff's property under the circumstances of this case, it would be unconstitutional on the ground that it would deprive plaintiff of his property without due process of law. The constitutional requirement that provision be made for non-assenting stockholders and creditors is not present in this case. It also, therefore, impairs the obligation of contracts.†

Plaintiff was not obliged to file a claim during the Rehabilitation proceedings. The Idaho statutes do not require the filing of a claim during Rehabilitation.††

Furthermore, the Idaho district court did not assume exclusive jurisdiction over actions against the defendant. The injunction did not cover actions against the defendant. The Court reserved the right to issue "further" injunctions, if necessary (Exh. 65),*** but did not do so.

IV.

Defendant argues that it cannot be returned to the status quo, because it claims it lost money on the Transatlantic Agency, and that plaintiff should be required to return the amount allegedly lost. This argument is frivolous.

The Agency agreement itself was not a part of the consideration flowing from the defendant to the plaintiff for the stock subscription. This consideration flowed from the defendant to the Transatlantic Corporation in exchange for services to be rendered the defendant by the

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† International Life Insurance Company v. Sherman, 262 U. S. 346; 67 L. Ed. 1018; Neblett v. Carpenter, 305 U. S. 297, 83 L. Ed. 182; Hessen Siak Shams v. State Bank of Bloomfield, 48 Fed. (2) 894.

†† In the matter of Bond & Mortgage Co., 271 N. Y. 545, 3 N. E. (2) 591; In the Matter of Lawyers Mortgage Co., 163 Misc. Rep. 680; Consolidated Laws of New York, Sects. 511, 512, 513, 514; Idaho Code, Sect. 41-3504, 3505, 3507, 3510.

*** Fletcher, Corporations, Sect. 7797, p. 372.

Transatlantic corporation. Even this consideration did not include a promise to guarantee the defendant against losses. The risk of underwriting loss was assumed entirely by the defendant.

The consideration which flowed from the defendant to the plaintiff was the **promise** to obtain Green Cards and excess limits, and facilities for France, Spain and Italy.* None of these things were obtained. Aside from the fraud, there was a total failure of consideration with respect to the collateral agreements, which were a part of the stock subscription agreement.

Plaintiff is not required to tender anything which was not a benefit under contract,** or undo acts of the other party.***

V.

Defendant's argument concerning its defenses of participation, ratification, and waiver is based upon the **evidentiary** facts that plaintiff was elected President of the company, that he signed the stock certificates, and other **evidentiary** facts which, standing alone may have a tendency to establish the **ultimate** facts necessary to establish these defenses. Defendant treats the evidentiary facts as if they were the ultimate facts although they are unrelated to each other, but are all related to undisputed, unexplained other facts, which conclusively remove them from the scope of the rule that the defendant is trying to invoke.

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* Williston, Contracts, Sect. 1325, 3 C. J. S. 204 (Implied obligation to cooperate by furnishing the Agent with the article that agent agreed to sell.)

** Duke v. Cregan, 91 Colo. 120, 12 Pac. (2) 354; 12A, Fletcher, Corporations 5604, p. 192.

*** Steele v. Scott, 221 Pac. 342, 192 Cal. 521; Russell v. Roscoe, 289 Pac. 185, 106 Cal. App. 293 (total failure of consideration); Simmons v. Calif. Inst. of Technology, 194 Pac. (2) 521.

Defendant is silent on the fact that the plaintiff's election was in the nature of a farce,* and that he was ousted without notice in order to violate his rights under the stock subscription agreement. It ignores the facts showing the repetition of the fraudulent misrepresentations,** and the concealment of the true financial condition of the defendant. It ignores the fact that negotiations between the parties were in progress during the entire relationship.*** It also ignores that plaintiff was at all times trying to mitigate a loss,**** and that the parties were in no event in para delicti.*****

Defendant doesn't deny or explain the existence of these facts. It treats them as if they are non-existent or as if they are wholly immaterial.

Defendant argues that plaintiff was obligated to prevent other money from coming in and to object to the termination of the Rehabilitation in order to preserve any of the rights which accrued to him as a result of the assistance he gave. At the time of plaintiff's subscription it was contemplated by both parties that someone other than plaintiff—because they wouldn't let plaintiff do it—was going to refinance the company and take control of the

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* McGrath v. Scherer & Co., 195 N. E. 919, Appellant's Brief, pp. 64, 65, 66, 67. The following cases are in point on this issue: Harper v. Tri State Motors, Inc., 90 Utah 212, 58 Pac. (2) 18; Viner v. Jones, 87 N. Y. S. 257; Peake v. Thomas, 308 S. W. 885; Samuels v. Smith, 196 N. W. 45 (Ia.); Nichols v. Yandre, 9 So. (2) 157 (Fla.); Horn v. Abbot, 168 N. W. 104, 110 Nebr. 403; Relle v. Mayfield, 69 S. W. (2) 167; McFarland Sanatorium, 137 Pac. 209, 68 Ore. 530; Arthur v. Griswold, 55 N. Y. 400.

** Commercial Bank of Minominee v. Widman, 301 Mich. 405, 3 N. W. (2) 323 (continuing tort); Fickensher v. Gamble, 85 Pac. (2) 885. See Ex. 52, Ex. 21, Ex. 59, Ex. 27, Ex. 43, Tr. 126, 127, 310, 117.

*** Reiniger v. Hassell, 216 Cal. 209, 13 Pac. (2) 737; Lobdell v. Miller, 250 Pac. (2) 357; White v. American National Life Insurance Co., 78 S. E. 582, 155 Va. 305; Meeks v. Commonwealth Bonding Co., 187 S. W. 681.

**** Trigg v. Jones, 48 N. W. 113, 46 Minn. 277; Bergstrom v. Pickett, 181 N. W. 343 (Minn.); Fosgate v. Nocatee Fruit Co., 299 Fed. 963; Grasgebauer v. Schneider, 31 Pac. (2) 93, 177 Wash. 43.

***** Karallas v. Shinns, 107 Pac. (2) 395, 41 Cal. App. 694; Hobart v. Hobart Estates Co., 159 Pac. (2) 958.

company, and that the rehabilitation order would then be removed.

Plaintiff agreed to this arrangement—somewhat reluctantly (Tr. pp. 55-201) because he was compelled to in order to mitigate the damage he had already suffered as a result of defendant's previous fraud and breach of contract* (Tr. p. 344). The removal of the Rehabilitation order was not part of the consideration for plaintiff's investment, but its removal was a very powerful inducing motive,** because he wanted to mitigate his damage. Defendant took full advantage of this to obtain, and later to retain plaintiff's subscription. The conditions attached to his agreement were part of the consideration. They were several and to be performed at different times.***

As to defendant's claim that plaintiff is trying to recover at the expense of innocent investors, who invested $750,000.00 in the defendant to rehabilitate it. None of these people intervened or even appeared at the trial of this case. The defendant is a going concern, so the fact that they do not elect to rescind is not a bar to plaintiff's action to rescind.****

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* Alder v. Crosier, supra, publication of a false financial statement, 50 Utah 437, 168 Pac. 83; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; White v. Nashville & NW. Ry. Co., 54 Tenn. 518.

** Williston, Contracts, Sections 111, 130.

*** Williston, Contracts, Sects. 860, 1292.

**** Cattle Raisers Loan Co. v. Sutton, 271 S. W. 233.

No. 18,226.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MORTON K. LANGE,
Appellant, Cross-Appellee,

vs.

LIBERTY NATIONAL INSURANCE COMPANY,
Appellee, Cross-Appellant.

Appeal from the United States District Court for the District of Idaho, Northern Division.

CROSS-APPELLEE'S BRIEF ON CROSS-APPEAL.

I.

Defendant's entire brief appears to be designed more to prejudice this Court against the plaintiff than it does to answer the arguments contained in plaintiff's brief. Instead of explaining why it failed to call material witnesses it has misrepresented the evidence in such a manner as to make it appear as if these witnesses had appeared and testified. Although the evidence at the trial was virtually undisputed, defendant raises fact issues in its brief, by mere assertions having no basis whatsoever in the evidence. It

also refers to facts contained only in hearsay documentary evidence, admitted by stipulation subject to a proper foundation, which were not referred to at the trial, as facts established by the evidence. Although defendant offered 49 exhibits, it identified only 10.* Some of these were self-serving declarations, and some purport to be admissions on the part of plaintiff, about which he was not cross-examined.** It does not appear that the trial court considered these exhibits, but that the defendant hopes that this court will. In particular, this refers to certain correspondence between the plaintiff and Mr. Becker, which although admitted by stipulation was not identified.

After reading this brief, we are more convinced than ever that the defendant prejudiced the trial Court against the plaintiff by means of a secret trial brief under Rule 9 j of the Idaho District Court. His oral remarks show that he was influenced by matters outside the record, the source of which could have only been the defendant.

This court cannot properly evaluate this case, unless it is made aware of the same brazen and calculated effort to prejudice it against the plaintiff. We have, therefore, corrected some of the most flagrant misstatements at the conclusion of this argument. We have included misstatements contained in defendant's brief on appeal as well as on the cross-appeal, because they are pertinent to the overall effort to prejudice this Court, and in particular in connection with the cross-appeal. Defendant is obviously well aware that its only hope of upsetting the findings of the Trial Court on the cross-appeal is to prejudice this Court by misstating the evidence, and confusing the issues.

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* Our original brief incorrectly shows that all of the Exhibits offered were plaintiffs exhibits. Exhibits 1 through 49 were plaintiffs. Exhibits 50 through 89 were defendants (P. T. O., p. 30).

** Esnault-Pelterie v. Chance Vought Corp., 56 Fed. (2) 393 (D. C. N. Y., 1938).

The defendant has especially flagrantly gone outside the record to prejudice the Court against the plaintiff in connection with this argument. Its statement, without any page reference to the record, that plaintiff took advantage of his control over the corporation to accumulate $50,000.00 or more in premiums to provide himself with a personal offset against the company; its statement that plaintiff was responsible for the corporation failing and refusing to make an accounting for the premiums collected until the pretrial order was entered, and its statement that plaintiff misappropriated the funds of the defendant* are statements which not only have no basis whatsoever in the record, but which are utterly and completely false. The undisputed evidence shows that the defendant violated its duty to Transatlantic in many respects and that there are many matters of legitimate dispute between them. There is nothing whatsoever in the record to show that Transatlantic, or plaintiff, at any time failed to account for any premium, any cancellation, or any payment collected or made upon behalf of the defendant. Had the defendant had such evidence, it certainly could have, and undoubtedly would have, produced it. Or it would have at least cross-examined plaintiff on the issue, in which event it would have been clear in this Court.

We do not expect this court to become involved in trying to decide fact issues in matters outside the record. We can only answer these charges by showing that they are outside the record, and by demonstrating that the dispute between the Transatlantic and the defendant involves the amount **due** under the contract, if anything, and not the amounts **collected** or **disbursed.** As to the latter the parties are in agreement.

The Agency Contract (Ex. 1) provides for a commission of 35%, except for Class 4 and 5 personnel (25%). It

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* In this connection see Chicago Fire and Marine Ins. Co. v. Fidelity and Deposit Company, 18 Pac. (2) 260, 41 Ariz. 358.

also provides for an adjustment at the end of each calendar year based upon paid losses, and a final adjustment upon termination of the Agency, "when all losses shall have been fully adjusted and paid." The stipulated conditional account-stated (P. T. O. p. 24) is based upon a commission schedule of 27½% for the first six months of 1957 and 30% prior thereto and thereafter. It does not purport to be, and expressly avoids being, a stipulation that the amount set forth therein is due and owing from the Transatlantic to the defendant, or that this is the applicable commission schedule. The amendment for the year 1957 specifically provided that it applied to that year only, and even that amendment was agreed upon, subject to conditions which were not fulfilled. Transatlantic, therefore, has a right to invoke the schedule provided for in the original contract, which in no event, would be less than the 30% for the entire year 1957. This is true, even though it may have withheld only 30% part of that time instead of the 35% it was entitled to withhold.*

The burden of proof was on the defendant to prove the terms of the agreement upon which the account was founded, and that it had fully performed the conditions of said agreement, and the amount due.** Also to establish that the contact was modified, if it was modified.*** The defendant failed to meet this burden of proof.

The defendant failed to show an up-to-date loss ratio based upon paid losses, or any loss ratio whatsoever. It tried to establish that the commission schedule set forth in the contract had been superceded by the schedule based on the loss ratio, by means of an "estimate" of company losses, which was pure opinion evidence with no evidentiary value, whatsoever. Transatlantic is entitled to a

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* Hulen v. Stuart, supra; Wann v. Diablo Finance Corp., supra, O'Shea v. Vaughn, supra; Williston, Contracts, Sects. 689, 690.

** Urdangen v. Edwards, 174 N. W. 769, 187 Ia. 1005, 1 C. J. S. 604.

*** The Jobs Haven, 270 Fed. 60.

full accounting based upon paid losses, and a final figure as to the actual loss ratio, before the amount due can be determined. Since the termination of the Agency contract, this information is solely within the knowledge of the defendant. Transatlantic is certainly not required to accept an "estimate" and especially not, in view of the past reserve juggling history of this company.

These losses were not material to the issue of the right of the plaintiff to recover his stock subscription. Under the evidence in this case plaintiff was not required to contest this issue, and did not. Transatlantic, however, has a right to dispute these alleged losses, and to show that they were attributable to excessive Home office expenses, excessive reinsurance rate, excessive brokerage fees for obtaining the business in the first place, or all of these, rather than from excessive losses due to claims.

In this case plaintiff is entitled to the benefit of an unfavorable inference against the defendant for producing "inferior" evidence when "superior" evidence, i. e., the actual loss figures, were available. It can be inferred that the superior evidence, if produced, would have been unfavorable and would have established that the Transatlantic was not indebted to the defendant in any amount whatsoever, based upon claims actually paid. This inference is strengthened somewhat by the intimation in the evidence that after the termination of the agency contract the defendant would not and did not properly pay its claims (Tr. pp. 255, 256, 359), and that they were still not all paid. Certainly, if the defendant was serious about this counterclaim it would have produced the strongest evidence available.* Of course, if it can prejudice this court by leading it to believe that plaintiff led this company into a disaster operation, it will have accomplished its purpose.

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* Wigmore, Evidence, Sect. 285.

The defendant had a legal right to terminate the Agency at any time after December 31, 1957. The uncontradicted evidence shows that it needed, depended upon and received the benefits of the Agency contract (Tr. pp. 182, 183) and that it not only continued it after December, 1957, but also that it induced the Transatlantic to continue for almost a year after the first termination notice, by making promises it did not keep (Tr. pp. 137, 138, 139, 140).

Defendant, however, recognizes Transatlantic's claim in the above respect, as well as its claims for fraud,** breach of contract, claims for services rendered, extra expenses and other claims mentioned in the evidence by suggesting (p. 35 of its brief) that they be made the subject of a suit between the Transatlantic and the defendant. It could have, but didn't, make Transatlantic a third-party defendant in Missouri had it been willing to risk being subjected to trial on these claims which belong to Transatlantic, but not to plaintiff in this case. Obviously, if it can divert the court's attention from plaintiff's very legitimate claim against it, and defeat this claim simply by talking about its counterclaim, rather than proving it, it will have accomplished a very satisfactory result.

In any event, the Transatlantic is entitled to retain the possession of the money claimed by the defendant under the express terms of the contract, and, as well, because it has the right of set-off and counterclaim against them for claims arising out of the same transaction.*** These issues could have been tried in the garnishment proceeding had the defendant not entered its appearance (P. T. O. p. 12) and dissolved the attachment, or if the defendant had made

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** Alder v. Crosier, supra (damages from a false financial statement).

*** Massachusetts Bonding and Ins. Co. v. Johnson & Harder, Inc., 199 At. 216, 330 Pa. 336; Spears v. Netherland Ins. Co., 31 Tex. C. A. 567, 72 S. W. 1018, 2 A. L. R. 133; Restatement of the Law of Agency, Sect. 464 (2nd Series); Downey v. Humphries, 227 Pac. (2) 484.

the Transatlantic a third-party defendant. They are, in any event, matters between the Transatlantic and the defendant, and not matters between the plaintiff and the defendant, and certainly not in this case,**** because the demands are not "mutual."

Before the obligations of a corporation will be recognized as the obligations of a particular individual, it must be shown that an adherence to the fiction of the separate existence would, under the particular circumstances sanction a fraud or promote an injustice.* The fact alone that an individual owns and controls the corporation is not sufficient. And the person making the claim must be able to sustain a claim against the corporation.** To set aside the corporate entity in this case, would sanction a fraud and promote an injustice on the part of the defendant rather than on the part of Transatlantic or the plaintiff. It would deprive both of a right to be heard on the legitimate issues between them and the defendant.

The court correctly ruled that the Transatlantic was an indispensable party to this action,*** not only on a technical legal ground, but on a basis of justice and equity. There is no evidence in this case that plaintiff has drained the corporate assets to defeat defendant's claim. The converse is true. The corporation, and the defendant had drained plaintiff of his. There is no evidence that Transatlantic cannot, or will not pay defendant's claim

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**** Looney v. Thorpe Bros., 277 Fed. 367; Schomberg v. Platt, 36 Oh. App. 118, 172 N. E. 685; Alden v. Central Power Corp., 137 Fed. Supp. 924.

* Homebuilders and Suppliers v. Timberman, 75 Ariz. 357, 256 Pac. (2) 716.

** Southeast Securities Co. v. Christenson, 66 Ida. 233, 158 Pac. (2) 315; Miller Lumber Corp. v. Miller, 357 Pac. (2) 503, ... Ore. ...; Wheeler v. Smith, 30 Fed. (2) 59 (C. C. A. 9, 1929); In re John Koke, 38 Fed. (2) 232, 363 Pac. (2) 1075; Oregon State Highway Commission v. Brassfield, 363 Pac. (2) 1075.

*** Chidester v. City of Newark, 162 Fed. (2) 598; Alden v. Central Power Corp., 137 Fed. Supp. 924; State of Washington v. United States, 87 Fed. 421; Metropolis v. Barkhausen, 170 Fed. (2) 481; Truman Homes Corp. v. Loan Holding Co., 88 N. Y. S. (2) 403.

in the unlikely event any amount is ever found due. The only ground that defendant established for setting aside the corporate entity in this case is that it doesn't dare to bring a suit to enforce the claim it alleges it has, but did not prove.

In view of the above, defendant's insinuations that plaintiff used his election as President to avoid having the bond renewed and to obtain concessions for the Transatlantic, are wholly immaterial. They are of course frivolous, as well. Mr. Albertson was in full control during the entire time plaintiff was supposedly acting as President, and plaintiff had no authority whatsoever.

The Trial Court correctly ruled that defendant's claim, if any was against the Transatlantic, not against the plaintiff, and its judgment should be affirmed.

Corrections of the Misrepresentations and Distortions of, and the Omissions From the Evidence Contained in Defendant's Brief.

Defendant's Brief, p. 3: "which order (of Rehabilitation) enjoined the officers and directors from taking any action with respect to the affiairs of the defendant, except with the written permission of the Rehabilitator." P. T. O. p. 14, Ex. 14.

The evidence: The injunction (Ex. 65) enjoined the officers and directors from transacting any business of the defendant, from wasting, handling or disposing of any of the property of the defendant, or from interfering in any manner whatsoever with the Rehabilitation. It did not enjoin the stockholders from selling their stock or from holding elections, and electing officers and directors.

Defendant's Brief, pp. 6 and 10: The source of the money upon which said check was drawn was the Transatlantic Casualty Underwriters, Inc., which company was then in-

debted to the defendant for premium moneys collected but not remitted in the amount of approximately $75,000.00 that represented most of its cash on hand at that time".

The evidence: (Tr. p. 168) Plaintiff testified that as of the 15th of December, 1956, when he came to Coeur D'Alene, the Transatlantic would have owed the company for the October statement, amounting to $29,000.00 or $30,000.00; that it had probably collected $75,000.00 at that time, but it was not due. That at that time the Transatlantic had in cash $87,340.00, accounts receivable of $40,000.63, and that plaintiff had personal assets of a little bit more than $30,000.00; that the defendant owed the Transatlantic at that time, approximately $15,000.00 for money advanced to pay claims (Tr. p. 262); that plaintiff advanced money to the corporation before the Rehabilitation (Tr. p. 148) and repaid all, almost all of his personal assets back into the Corporation (Tr. pp. 262, 263) and that the corporation is indebted to him (Tr. p. 257). Although the plaintiff produced all of the Transatlantic records for examination by the defendant (Tr. p. 262) defendant offered no evidence whatsoever to contradict plaintiff's evidence on this point.

Defendant's Brief, pp. 14, 22, 23, 31: "That plaintiff communicated with Mr. Becker relative to such purchase and wired him that **he wouldn't oppose** such sale if the other stockholders favored it." p. 14; "that the plaintiff had been soliciting and encouraging the Becker group for weeks", p. 22; "that plaintiff was relying upon such refinancing" (by the Becker-Rummel group), p. 22; "plaintiff even sent a telegram to Mr. Becker on April 7, stating **he had** no objections to his group **buying the remaining 38,000 shares**", p. 22; "pursuant to such indicated approval an option was taken on all of said stock by the Becker-Rummel group on March 25, 1957 under which the purchase was conditioned on sufficient approval

by the defendant stockholders", p. 22; "Plaintiff testified that he was willing to retain his stock in the defendant, and go along with the Becker management, and later wanted Mr. Becker to buy him out". p. 24; "Plaintiff thereafter issued the stock certificates to himself and others * * * and **solicited** large funds from the Becker-Rummel group, p. 31 (Allegedly after he learned that the money had been turned over to the defendant)."

The evidence:

(The clarification of the half-truths contained in defendant's brief, in connection with the sale of the stock to the Becker-Rummel group requires an analysis of evidence and events which, when omitted, create an impression not in accord with the facts. The time of the occurrence of these events is also material. We are therefore listing them in the order of their occurrence.)

Jan. 6, 1957: Plaintiff was informed by Mr. Albertson that a financing proposal under which plaintiff would have control of the company for a period of three years was not acceptable to the Insurance Department, because it did not want an agency to control the company. On the same day the Becker-Rummel group commenced negotiations to purchase a controlling interest in the defendant (Deft's brief, pp. 4 and 7, P. T. O. p. 17, Tr. p. 53).

Jan. 25, 1957: Mr. Becker wrote plaintiff confirming a previous conversation, and asking plaintiff whether he was willing to sell enough of his shares to insure control of the company. Plaintiff did not want to sell to the Becker group because they were investment people, and because he thought control should remain in Idaho, so he advised Mr. Becker that he did not want to sell until he knew more about his group and their plans for the company. Tr. p. 86.

March 1, 1957: Mr. Albertson advised plaintiff (Ex. 57) that the Wester offer had been withdrawn, and that he again recommended that plaintiff consider his own ability to refinance the company.

March 10, 1957: Mr. Albertson advised plaintiff (Ex. 59) that the possibilities of refinancing rested upon the Becker group, and upon plaintiff.

March 18, 1957: Plaintiff telephoned Mr. Becker and asked him **what his intentions were**, with respect to the refinancing, and he advised plaintiff that he didn't know, that he didn't have anything definite, and that investigation was still underway. On March 22, Mr. Becker advised plaintiff by wire that his group had taken an option on a controlling interest (Tr. pp. 86, 87). Plaintiff did not testify that he solicited the Becker-Rummel group. There was no testimony to that effect. Mr. Becker did not testify. Exhibit 78 is a self serving document, about which plaintiff was not even cross-examined.

March 18, 1957: Mr. Albertson wrote plaintiff (Ex. 22) that the "people with whom he had been consulting" had advised the sale of the 38,377 shares of stock; that the Becker-Rummel group had made a proposal to buy these shares, but not to buy the shares of the old stockholders; and that the Stuyvesant Insurance Company was willing to buy the 38,377 shares of stock and also to buy all of the shares of the subscribers under the minimum financing proposal. He also advised plaintiff that either one of these deals would "certainly take the pressure off the company's operations in Germany, and requested plaintiff's reaction by return cable. Plaintiff did not answer this letter, because he did not understand the situation there, and for the same reason he had not signed and returned the stock Mr. Albertson had sent him on Feb. 25 (Tr. p. 82).

March 25, 1957: A stockholders' meeting was held by the defendant to authorize the sale of the 38,377 shares of stock. The meeting was held without notice to plaintiff, was attended by the old stockholders only and was presided over by R. S. Nelson as President of the Company and Chairman of the Board. Two days later, the sales contract was signed (Exs. 24, 26) with the Becker-Rummel group.

March 29, 1957: Plaintiff received a telephone call from Mr. Albertson asking him to support the Stuyvesant proposal, which plaintiff agreed to do. Plaintiff testified that he did not favor the Becker-Rummel group because they were investment people, not insurance people (Tr. pp. 85, 86).

March 29, 1957: Plaintiff cabled the Stuyvesant Insurance company that he would cooperate with them in their efforts to purchase the defendant. On the same day he wrote Mr. Albertson that he did not feel that he had been well enough informed to express an opinion about either one of the two proposals.

March 30, 1957: Plaintiff signed and returned the stock certificates to the secretary of the Company with a letter (Ex. 23, Tr. pp. 81, 82, 83) of the same date cautioning him against issuing the stock until the "rights of the new stockholders had been clarified." The defendant, nevertheless, issued the stock, although the March 31st financial statement showed a decrease in surplus of over $100,000.00 (Ex. 38). Plaintiff was not advised of this statement until April, 1960.

April 2, 1957: Plaintiff received Exhibit 25 urging his support of the Becker-Rummel proposal, in which Mr. Becker advised plaintiff that unless he did his clients might withdraw (Tr. p. 85). Plaintiff proceeded to London to meet the Stuyvesant people, and telegraphed his address in London to Mr. Becker (Tr. p. 88).

April 3, 1957: A meeting of the Board of Directors of the defendant was held and the contract of sale entered into between the old stockholders and the Becker-Rummel group was approved subject to the amendment that approval be obtained from only 70% of the owners of the 21,623 shares "now sold or allocated". Plaintiff received notice of the meeting on April 4 (Tr. p. 89). The meeting was presided over by Mr. Philip E. Dolan in the absence of the President, Mr. Morton K. Lange.

April 3, 4, 1957: Plaintiff was negotiating with the Stuyvesant Insurance Company, when he was notified that the stock had been sold to the Becker-Rummel group without his consent, and that there was apparently nothing he could do about it (Tr. p. 89).

April 4, 1957: Mr. Dolan wrote to plaintiff that several proposals for refinancing were being **considered**, and that something should be known soon. Also that additional savings of about $50,000.00 on claims reserves could be expected, in his opinion.

April 5, 1957: A waiver and consent was sent to plaintiff with a request that plaintiff sign and return it to signify his approval of the sale to the Becker-Rummel group. Plaintiff did not return this consent and waiver and has never done so (P. T. O. p. 23). The stock was sold to the Becker-Rummel group on March 27, and the amendment approved on April 4, before plaintiff's approval had been asked for, or indicated.

April 7, 1957: Plaintiff returned to Munich, tried to call Mr. Becker, and finally cabled Mr. Becker that **he knew of** no objections to his clients proposals, and that **they could expect no trouble from plaintiff** if the other stockholders were in favor thereof (Ex. 25, Tr. p. 93).

April 11, 1957: Plaintiff telephoned Mr. Becker about the sale of the stock. Mr. Becker advised plaintiff that

his clients would buy all or any part of plaintiff's stock. Also that his group did not contemplate the termination of the German business. In reliance upon these statements plaintiff decided not to attend the stockholders meeting of April 15, 1957, and made arrangements with his associate, Mr. Smith, to meet with Mr. Becker to arrange to have him buy the stock. Mr. Smith contacted Mr. Becker in New York, but Mr. Becker avoided seeing him (Tr. pp. 95, 96). Plaintiff testified (Tr. p. 96) that he would not have objected to the sale to the Becker-Rummel group **if they would buy his stock.** Plaintiff did not attend the stockholders meeting, because he thought Mr. Becker would buy the stock (Tr. p. 95). Mr. Becker confirmed that plaintiff offered to sell the stock by letter dated April 26 (Ex. 33). At the meeting of April 15, the stockholders present approved the sale to the Becker-Rummel group.

April 20, 1957: Plaintiff received a telegram from Mr. Albertson (Ex. 31) threatening him with a breach of the terms of the Agency contract, which had been agreed upon at the time of the stock subscription (Ex. 31).

April 21, 1957: Plaintiff employed an attorney to protect his interests which attorney wrote the defendant and notified it that plaintiff questioned the legality of the stock sale (Ex. 32).

April 26, 1957: Mr. Becker advised plaintiff that he, and his clients had purchased a controlling interest in the defendant, confirmed that Mr. Smith had advised him that plaintiff would not attend the stockholders meeting, and would like to sell his stock to his clients. With this letter, negotiations commenced with the Becker-Rummel group which continued until the end of the relationship (Tr. pp. 102 through 120, 137 through 142).

Defendant's Brief, p. 25: "Plaintiff voted his stock at a special stockholders' meeting of defendant in November, 1957."

The evidence: Plaintiff voted his stock at a special stockholders meeting of defendants in November, 1957, by proxy at Mr. Becker's specific request, "because Mr. Chapman had been fired and was expected to make trouble".

Defendant's Brief, p. 25: "Even after he had made "**some claims**" of being defrauded, plaintiff signed his own stock certificate, and those of the other members of his "group", which other members invested about $100,000.00" * * * some of whom relied upon him (plaintiff) in making their investment.

The evidence: Nobody testified and there was no evidence that plaintiff was a member of any group. There is not a word of any testimony from any witness, or any evidence in any document that any investor relied upon plaintiff in making his investment. Defendant makes no page reference to the record to support this statement. The only claim of fraud plaintiff had made previously specifically referred to Mr. Albertson's agreement to permit joint control made with the intention of not carrying it out (See Ex. 27).

Defendant's Brief, p. 20: "Plaintiff should have known about the accuracy of some important items in the financial report, "for it later developed that it was his own German business that caused substantial losses for the defendant in 1956."

The evidence (Tr. pp. 225-226): Plaintiff testified that the Agency was writing a considerable amount of insurance for the Liberty National at the end of 1956; that the company had to take his word for the amount of claims reserve to set up on these writings; and that he had no recollection of having sent in quite a large bunch of new claims after he returned to Germany. Nobody testified that plaintiff did send in a bunch of new claims, nobody

testified or contended that the reserves for the German business were not accurate.

The defendant's conclusion in this respect has no basis in the evidence whatsoever.

Defendant's brief, page 17: "While plaintiff incredibly denies that he had knowledge that such was going to happen" (The acceptance of the money before March 15).

The evidence: Plaintiff did not deny that he knew the money was going to be accepted before March 15. He claims that he did not know the money would be accepted before the joint control order went into effect, and unless and until sufficient funds had been subscribed in accordance with the terms of the subscription.

Defendant's brief, page 18: "By the end of March, 1957, however, the defendant's capital was again impaired 'due to further losses' ".

The evidence: The Defendant made no explanation of the decrease in surplus between January 11 and March 31, 1957, and there was no evidence to establish the further losses, or what they were.

Defendant's brief, page 21: "Plaintiff's Agency was never profitable for defendant, and from January, 1957 it caused losses to the defendant of more than $100,000.00."

The evidence (Tr. p. 359): Mr. Dolan testified: "It never did run off profitably, so **'obviously'** there were losses. **I can not give you an exact figure,** but I would approximate it at $100,000.00, because our losses are still continuing." Defendant's "**estimate** of $100,000.00 **or more**" in the evidence becomes an established figure of "**more than**" in its brief (Emphasis ours).

Defendant's brief, page 21: "The defendant's management made diligent efforts to obtain Green Cards to **'please'** plaintiff."

The evidence (Tr. p. 373): Mr. Dolan testified: "There was an effort to be made to get Green Cards, and that was one of his conditions when he was out there in December and January, that the question was when they could get the Green Cards, and 'you bet' the company was to attempt to get them for him." Nobody **testified** that the repeated promises and efforts to obtain Green Cards were to please plaintiff.

Defendant's brief, page 24: "The Rehabilitator would not have recommended that defendant be discharged **without** the investment of plaintiff, the Becker-Rummel group, and the other subscribers."

The evidence (Tr. p. 350): Mr. Albertson testified that if the money of plaintiff **and** of the other stockholders had not been in the treasury, he would not have recommended the company for discharge. In answer to the direct question from the Court as to whether he would have discharged, if plaintiff's money was not there, he testified only that if plaintiff's money had not been in the treasury in January, the company would have been liquidated.

Defendant's Brief, page 10: "The evidence shows that plaintiff attempted to largely condition his investment on benefits that would accrue to his Transatlantic Company at better commission rates."

The Evidence: Both plaintiff (Tr. pp. 76, 77) and Mr. Smith (Tr. p. 297) testified that the commissions were reduced not increased. This was corroborated by all of the correspondence, Exhs. 8, 9, 57, 58, 33, and defendant's own statement on page 16 of his brief that the commissions were higher than the defendant felt obliged to reduce them in October, 1956. The tentative change was made in October while the Rehabilitation was still being concealed from plaintiff as was the 5% override being charged by the Reinsurance agency. The amendment to the agency

contract, plus the elimination of the 5% override, plus the 20% increase in rates (see Ex. 52) meant an overall advantage to the defendant of from 27½% to 30% over the previous year.

Defendant's Brief, pages 9 and 33: "It is admitted that the Transatlantic Casualty Underwriters, Inc., has collected insurance premiums on behalf of the defendant in Germany which it has refused and still refuses to pay over to the defendant in the amount of $49,297.58.

"He took advantage of his control over the corporation to accumulate $50,000.00 or more in premiums due to provide himself with an offset on his personal claims against the company.

"He went through the formality of attaching these funds, but never carried through to the point of answering the writ of attachment although it was long past due."

The Evidence, P. T. O. page 24: "In connection with plaintiff's cross-claim it is admitted that the amount of premiums collected by the Transatlantic Casualty Underwriters, Inc., **based on a commission rate of 27½% for the first six months of 1957 and 30% prior thereto and thereafter is $49,297.58.**"

The Evidence continued, P. T. O. page 12: "Defendant appeared (in the attachment proceeding) and removed the case to the United States District Court, on the ground of diversity of citizenship, and at the same time filed its answer and counterclaim and cross-complaint. * * * Plaintiff not having filed a bond, **after** defendant's appearance and answer, the attachment was automatically terminated ten days subsequent to the filing of defendant's answer.

Exhibit No. 1: The rate of commission mutually agreed upon for this class of business shall be:

(a) Private passenger vehicles

Policies covering on classes 4 and 5.... 25%

All others 35%

(Note: The contract also called for a provisional commission based upon the loss ratio, concerning which there was no evidence.)

Tr. p. 360 (Testimony of Mr. Dolan): I talked to plaintiff on the telephone on several occasions. He did say that he was going to accumulate premiums. Frankly I would have stopped writing for him, but Mr. Becker didn't. (Note that Mr. Dolan did not negative Transatlantic's claim to possession of the money claimed under the express terms of the contract, which Mr. Becker very obviously recognized by not stopping writing.) Mr. Becker, with whom plaintiff dealt, did not testify.

CONCLUSION.

We submit that the evidence in this case is so clearly and overwhelmingly in favor of plaintiff's recovery that this Court is more than justified in reversing the judgment of the trial Court and granting rescission.

There is much more, however, involved in this case than plaintiff's $50,000.

It was not intended, we submit, that the Rehabilitation Statutes were to be used to extract money from innocent investors for the purpose of paying the debts of a company, and to rehabilitate it at their expense. According to defendant's own statement, that is precisely what occurred in this case.

By putting the stamp of approval on the company's action in this case, the Court will not only approve an injustice to plaintiff, it will give this company with same officers as before—only more experienced in the art—and

other companies similarly inclined, the go signal to repeat again and again what they have accomplished in this case.

Respectfully submitted,

THOMAS A. MITCHELL,
Attorney for Appellant.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....
Attorney for Appellant and Cross-Appellee.

Service of the above and foregoing Brief of Appellant is hereby admitted and three copies have been received by me this .... day of May, 1963.

.....
Attorney for Appellee and Cross-Appellant.

APPENDIX A.

Feisthamel v. Campbell, 55 Cal. App. 774, 205 Pac. 25 (1921).

"It is uniformly held to be the law that the wrongful delivery by an escrow holder, contrary to instructions under which he holds the property, will confer no title, particularly as against those who take with notice. We have already suggested that upon performance of the condition required of the vendee, the escrow holder or trustee no longer holds the property as the property of the vendor, but for the vendee; and that the remedy of the vendee in such a case is against the trustee or escrow holder to compel delivery of the subject of the deposit. There was in this case a wrongful delivery of the certificate of stock to Dent * * *. The vendees having available to them the remedy to compel the depository to turn over the stock, we think that the remedy followed the stock into the hands of the person who wrongfully became possessed of it."

People ex rel. Conway v. Metropolis Fire Ins. Co., 239 N. Y. S. 55, 136 Misc. 133.

"It will be observed that the insurance company under its agreement could become entitled to moneys held by the bank only upon fulfillment of the conditions set forth in paragraph 4 of the agreement. Without its fulfillment of these conditions, the insurance company could claim no right of property therein. These conditions were not complied with, and cannot be complied with because the insurance company has dissolved. The insurance company at the time of the dissolution had no title to these moneys, and hence none can pass to the Superintendent of Insurance in the liquidation proceedings. The bank holds them under a valid trust agreement and it is bound to discharge its obligations thereunder."

Note: In this case money was paid in trust to the bank under a stock subscription agreement which was conditioned upon the reorganization of the insurance company.

McDonald v. DeFremery et al., 168 Cal. 199, 142 Pac. 77.

"It is to be noticed that the Court utterly fails to find whether or not the report was or was not false in any essential particular, precisely as it fails to find upon the good faith of the defendants, which they pleaded to the effect that whether correct or incorrect, the report was but an expression of opinion upon questions of value. * * * an expression of opinion, to avoid an action for deceit, must be the expression of an opinion honestly entertained by the person making it. * * *

"It is sufficient, in order to maintain an action for deceit that the false statement was one, although it may not have been the sole inducement for the purchase."

Farmlands Development Co. v. Taft, 186 N. W. 431 (Iowa, 1922).

"Subscriptions to stock may be made upon a condition precedent, and when made constitute a contract between the several subscribers, which cannot be withdrawn or revoked by anyone without the acquiescence of all. It is a continuing offer—a conditional subscription. Such subscription, when the conditions are complied with, are binding upon the parties to the same extent as if the contract had been absolute and unconditional. Cravens v. Eagle Cotton Mills Co., 120 Ind. 6, 21 N. E. 981; Armstrong v. Kausner, 47 Ohio St. 276, 24 N. E. 897; Richelner Hotel Co. v. Circumpmit Co., 140 Ill. 248, 29 N. E. 1044; Minneapolis Threshing Machine Co. v. Dover, 40 Minn. 110, 41 N. W. 1026; Lake Ontario v. Mason, 16 N. Y. 451, 14 C. J. S. 535."

Campbell v. Coin Machine Mfg. Co., 188 Pac. 197, 96 Oreg. 119.

"Shares of stock are defined as: The right to participate in a certain proportion in the immunities and benefits of the corporation, to vote in the choice of their officers, and the management of their concerns, and to share in the dividends and profits, and to receive an adequate part of the proceeds of the capital on winding up and terminating the active existence and operation of the corporation.

"The five shares of capital stock of the par value of $10.00 proposed to be delivered to plaintiff by defendant would not comply with defendant's contract to deliver to plaintiff five shares of capital stock of the par value of $100.00 each in a corporation with a capital stock of $4,000,000. The plaintiff might desire to pledge his shares as security for a loan, or he might desire to sell the same, and to tersely express it, it would be entirely different stock."

McClunn v. Central Trust Co., 165 N. Y. 108, 58 N. E. 777.

"When dealing with sales of securities there are implied representations which flow from the fact of sale * * * The sale itself may give rise to implied representations just as effective as if the seller had made express statements to same effect.

Harper v. Tri-State Motors, Inc., 90 Utah 212, 58 Pac. (2) 18, the Court said:

> These facts, if not explained, or if their effect be not explained by other evidence, might well be regarded by the trier of facts as evidence that he did participate in the transaction. The fact that he signed the stock certificates is alone strong evidence of that

fact, and in the absence of other evidence might be sufficient to support a finding against him. But there is other evidence, if believed by the trial court, * * * which shows beyond peradventure that Holbrook took no part in the transaction whatsoever.

In Peake v. Thomas, 308 S. W. 885, it was held that a director of a bank could not be held liable for information the cashier of the bank concealed from everyone. The Court said:

"A director of a corporation will be charged with a knowledge of the facts concerning the company condition, which is presumably within his knowledge, yet such rule can only mean such facts as he knows, or by the exercise of ordinary care could have known, the appellee cannot be held accountable for failing to disclose this shortage.

"The evidence shows that the cashier had so skillfully concealed his speculations that repeated examinations by the State Banking Authorities had failed to discover them. Appellee did not actually know of this shortage. There were no circumstances present to excite his suspicions. It is not shown that they could have discovered what the State Banking Examiner had failed to find. Appellants own son who succeeded appellant on the Board of Directors failed for almost two years to find out not only about this shortage, but about others which were added to it during those years. It cannot be said that the Appellee, in the exercise of ordinary care could have discovered the fact of this shortage, and hence he cannot be charged with constructive notice of it."

Samuels v. Smith, 196 N. W. 45.

The Court said: "The crucial question is whether there was any bad faith on Smith's part in such profession o

confidence. A careful reading of the record satisfied us that Smith had implicit confidence in the desirability of the investment; that he never assumed any relation of agency to the corporation; that he never received any compensation of any character; that he never profited directly or indirectly by any sale of stock made; that on the contrary, he was a heavy loser personally, as stockholder having acquired altogether more than $7,000 worth of stock. The trial Court properly ruled that he was guilty of no bad faith or wrongful conduct of any kind in relation to the defendants."

Trigg v. Jones, 46 Minn. 277, 48 N. W. 1113.

"a careful persual of the evidence satisfies us that while plaintiff was informed by letter as early as August, 1887, that the deed had been delivered, yet the information was accompanied by statements that and assurances by Jones that the original arrangement would be carried out or was being carried out, so that he would get his stock as agreed, and that Cook would return the deed, or reconvey the property, which were calculated to keep plaintiff quiet, and allay any possible fears on his part; and that influenced by these considerations, he made no express repudiation of Jones' act, but let matters rest, hoping that the deal would be consummated according to agreement, and he get the stock to which he would be entitled. At the insistence of Jones he sent a proxy to one Mohle authorizing him to subscribe to stock; but that finally having discovered that the whole deal had fallen through, and would never be consummated, he brought this action to recover either the land or the damages. * * * This amounted to nothing more than an effort on plaintiff's part to avoid loss, which is not such a ratification as will relieve the agent."

Grasgebauer v. Schneider, 31 Pac. (2) 93, 177 Wash. 43.

"The rule permitting performance of acts in affirmance of an executed contract after discovery of fraud, without waiving an action for deceit, also applies to contracts which have been only partly performed at the time of the discovery of the fraud. Bean v. Bickley, 187 Ia. 174 N. W. 675. Among illustrations of the rule are two which apply here. One is where the party defrauded will lose a profit, which he would have enjoyed had he been fairly dealt with. Another is where the rescinding party cannot be restored to his original position. In this case the respondents' efforts be accepted as true, the respondents have lost the benefit of their bargain as it was represented to them, and also the benefits of the efforts they have expended on the property."

The case of Cromwell v. County of Sac, 94 U. S. 351 24 L. Ed. 195 is in point. There the Court said:

> "Various considerations other than the actual merits may govern a party in bringing forward grounds of recovery or defense in an action, which may not exist in another action upon different demand, such as the smallness of the amount, or value of the property in controversy, the difficulty in obtaining the necessary evidence, the expense of the litigation, and his own situation at the time. A party acting upon considerations like these ought not be precluded from contesting in a subsequent action other demands arising out of the same transaction."

In White v. Nashville & N. W. Ry. Co., 54 Tenn. 518 the rule is stated as follows:

> "Waiver is a relinquishment of, or a refusal to accept a right. The waiver of one of several rem

edies, or the waiver of a remedy as against one of several parties, does not extinguish the right. Thus it is said that a party may waive a part of his right and sue for the other part."

Reiniger v. Hassell, 216 Cal. 209, 13 Pac. (2) 737.

"Where a person protests promptly on discovering that he has been defrauded in making a contract, and enters into negotiations for a peaceful settlement which fail, a complaint filed within a reasonable time after such failure is not barred by laches."

Fickensher v. Gamble, 85 Pac. (2) 885.

"It should also be borne in mind that the deal was made up of a series of contracts, consisting of three exchange agreements and numerous escrow instructions. Plaintiff did not waive the fraud of the original representations by entering into the later contracts by reason of the fact that during the entire course of the transaction she remained unaware of the fraud which was being perpetrated upon her."

Wann v. Mount Diablo Finance Corporation, 23 Pac. (2) 303, 132 C. A. 621.

The fact that the fund of $25,000.00 was not built up (as represented at the time of the subscription) does not of itself give plaintiff cause for complaint, for many reasons might arise where the accumulation of that amount might be legally impossible, but he may properly protest against the voluntary abandonment of the project without his consent, and on that ground rescind. It is true that he consented to the abandonment of the first plan, but conditionally, and upon the failure to perform the promised conditions his original consent was without consideration and could be revoked, and be restored to his original status.

In the Matter of Bond and Mortgage Guaranty Company, 271 N. Y. 545, 3 N. E. (2) 591.

"The Bond and Mortgage Company was in rehabilitation, not in liquidation. There is a marked distinction. In Rehabilitation, there are no claims to be presented and allowed. In liquidation, claims liquidated or contingent must be presented within a certain designated time."

In the Matter of Lawyers Mortgage Company, 163 Misc. Rep. 680, 298 N. Y. S. 88.

"No reorganization can be accomplished in the pending Rehabilitation proceeding, in view of the fact that sections 424 and 425 of the Insurance law for the filing and proof of claims apply only to liquidation proceedings. Only through a liquidation proceeding can the company be freed from unknown and unpresented claims. Unless 100% of the stockholders and creditors agree to a plan it is clear that provisions must be made to protect the rights of nonassentors."

In re International Milling Co., 259 N. Y. 77, 18 N. E. 54.

"As the bank was the bailee and not a debtor as to the fund in question, there can be no doubt as to the petitioner's right under the Section to claim a preference. To hold that the Section excludes petitioner from claiming the Identical fund in question as bailor would, in the event the assets should prove to be insufficient to meet the claims of preferred creditors, amount to a confiscation of his property without due process of law. Such construction would make the statute unconstitutional, and is unnecessary because the statute contains no words which evidence an intent to exclude existing remedies.

In Maloney v. Rhode Island Insurance Company, 251 Pac. (2) 1027, 115 C. A. (2) 238, it was held that a conservatorship court does not have jurisdiction to bring into pending conservatorship proceeding by mere order to show cause, persons who are not parties to conservatorship, and who assert independent claim of ownership to assets in their possession.

Udangen v. Edwards, 174 N. W. 769, 187 Ia. 1005.

"The plaintiff asked for an accounting. He was bound in equity to make an accounting himself. Under his contract, he was to pay the defendant 10% of the profit. He never paid him any profits, and never made any statement concerning profits. There was no data in the hands of Edwards from which profits could be estimated. The plaintiff alone knew what he paid for the bankrupt stocks. He alone received the trade discounts. We think it was incumbent upon him in equity to disclose the amount of profits due him from Edwards, and to tender it as a credit upon any amount found due him from Edwards. The inference arises quite naturally that his unwillingness to disclose his profits was the reason for his failure to produce his books."

41-3504. Grounds for Rehabilitation.—The commissioner may apply for an order directing him to rehabilitate a domestic insurer upon one or more of the following grounds: That the insurer

(a) is insolvent; or,

(i) has consented to such an order through a majority of its directors, stockholders, members, or subscribers; or,

41-3505. Order of Rehabilitation—Termination.—1. An order to rehabilitate a domestic insurer shall direct the commissioner forthwith to take possession of the property

of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary, as the court may direct.

2. If at any time the commissioner deems that further efforts to rehabilitate the insurer would be useless, he may apply to the court for an order of liquidation.

3. The commissioner, or any interested person upon due notice to the commissioner, at any time may apply for an order terminating the rehabilitation proceeding and permitting the insurer to resume possession of its property and the conduct of its business, but no such order shall be granted except when, after a full hearing, the court has determined that the purposes of the proceedings have been fully accomplished.

41-3510. Conduct of Delinquency Proceedings Against Insurers Domiciled in This State.—1. Whenever, under the laws of this state, a receiver is to be appointed in delinquency proceedings for an insurer domiciled in this state, the court shall appoint the commissioner as such receiver. The court shall direct the commissioner forthwith to take possession of the assets of the insurer and to administer the same under the orders of the court.

2. As domiciliary receiver, the commissioner shall be vested, by operation of law, with the title to all property, contracts, and rights of action, and all of the books and records of the insurer wherever located, as of the date of entry of the order directing him to rehabilitate or liquidate a domestic insurer, and he shall have the right to recover the same and reduce the same to his possession.

5. Upon taking possession of the assets of an insurer, the domiciliary receiver shall, subject to the direction of the court, immediately proceed to conduct the business of the

insurer or to take such steps as are authorized by the laws of this state for the purpose of liquidating, rehabilitating, reorganizing, or conserving the affairs of the insurer.

41-3512. Injunctions.—1. Upon application by the commissioner for such an order to show cause, or at any time thereafter, the court may, without notice, issue an injunction restraining the insurer, its officers, directors, stockholders, members, subscribers, agents, and all other persons from the transaction of its business or the waste or disposition of its property until the further order of the court.

2. The court may, at any time during a proceeding under this act, issue such other injunctions or orders as may be deemed necessary to prevent interference with the commissioner or the proceeding, or waste of the assets of the insurer, or the commencement or prosecution of any actions, or the obtaining of preferences, judgments, attachments or other liens, or the making of any levy against the insurer or against its assets or any part thereof.

41-3507. Order of Liquidation.—1. An order to liquidate the business of a domestic insurer shall direct the commissioner forthwith to take possession of the property of the insurer, to liquidate its business, to deal with the insurer's property and business in his own name as Commissioner, or in the name of the insurer as the court may direct, to give notice to all creditors who may have claims against the insurer to present such claims.

41-3523 provides that upon granting an order of liquidation, the Insurance Commissioner shall notify all persons who may have claims against the insurer to file them within four months of the time of the entry of such order.